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IN THE

Supreme Court of the United States

DIAMOND JO CASINO,

Petitioner,

v.

DAWN RANNALS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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The American Insurance Association ("AIA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Diamond Jo Casino.[1] In accordance with Rule 37.2(a) of this Court, the AIA obtained the written consent from both the Petitioner and the Respondent.

INTEREST OF *AMICUS CURIAE*

The AIA's roots go back more than 130 years to the establishment of the National Board of Fire Underwriters in 1866, and today, it has evolved into a national trade association representing 410 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of the AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. The AIA is headquartered in Washington, D.C., maintains seven regional offices, and retains legislative counsel in every state.

SUMMARY OF THE ARGUMENT

Certiorari should be granted in this case because the Sixth Circuit takes an unprecedented leap from existing maritime and agency law by holding that a Department of the United States Government is the agent of a private Jones Act employer corporation. By stretching the bounds of agency law while simultaneously taking the concept of foreseeability to unpredictable limits,[2] the Sixth Circuit punishes a party in the

1. This brief was authored by James Patrick Cooney and Chester J. Makowski, the attorneys representing the AIA. No person or entity other than the AIA made a monetary contribution to the preparation or submission of this brief. The AIA has the consents of the parties and such consents are being lodged herewith.

2. In the instant case, the majority acknowledged the difficulty that Diamond Jo, a riverboat casino business operating in Iowa, faces in monitoring the safety of its (Cont'd)

name of safety for subsidizing the safety training of its employees and for its investment in the greater safety of the general public. The Sixth Circuit's decision allows recovery where no party has been negligent under the law as it could be known to them.[3] The decision wreaks havoc upon traditional underwriting practices and discourages responsible corporate citizens from taking measures which benefit the safety of the general public.

The law has historically recognized the value of taking preventative safety measures and has actively encouraged actors to do so. This principle is recognized in a number of areas, such as: (1) the Federal and many state Rules of Evidence prohibiting admission of evidence regarding remedial measures taken after an accident; (2) state dram shop laws that encourage tavern owners to send their bartenders to state certification programs which carry with them a safe harbor defense in the event the tavern owner is subsequently sued; (3) in the context of Title VII of the Civil Rights Act of 1964, an employer has a defense to allegations of sexual harassment if the employer (a) exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer; and (4) in the numerous Good Samaritan laws which encourage volunteers to come to the aid of the injured. The Sixth Circuit's decision controverts the sound public policy underlying such laws by discouraging, rather than

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(Cont'd)

> employees who are attending a seminar out of state in Ohio, [however] we do not believe that such difficulties exempt Diamond Jo from liability for the actions of [the Department of Transportation].

Rannals v. Diamond Jo Casino, 265 F.3d 442, 451 (6th Cir. 2001).

The obligation imposed by the Circuit upon Diamond Jo and others similarly situated is truly one that cannot be enforced. As noted by this Court, "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922).

3. *See Diamond Jo*, 265 F.3d at 456.

promoting, responsible corporate citizens from participating in safety programs that benefit the general public.

ARGUMENT

I. THE SIXTH CIRCUIT'S UNPRECEDENTED DECISION IMPOSES AN UNFOUNDED AND UNWORKABLE AGENCY RELATIONSHIP UPON THE UNITED STATES GOVERNMENT.

In an attempt to permit Ms. Rannals an avenue of recovery against her employer, the Sixth Circuit stretches the bounds of agency law, takes an unwarranted and ill-advised course, and holds that a department of the Executive Branch, the Department of Transportation ("DOT"), is the agent of a private corporate citizen.

A. No Court Has Ever Held that the Government May Be the Agent of a Private Citizen

Although there are certainly instances when a private citizen or a corporation may act as an agent of the government, *e.g.* in the context of a corporation fulfilling a governmental function or an individual citizen acting on behalf of the government,[4]

4. A private agency, an organization, an individual or a group of persons can be federal "instrumentalities" only to the extent that there is a clearly expressed Congressional intent to create a "principal/agent" relationship between the government and these private parties. In other words, one cannot call himself an "instrumentality" or "arm" of the government merely because he believes himself to be, or even because he happens to be, fulfilling a legitimate governmental purpose. Rather, the extent to which a private entity can be deemed to be acting on behalf of or in the place of the federal government can be determined only by a careful examination of the relevant federal statutes and regulations, and the available legislative history. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (where this Court stated that a corporation is a part of the government for constitutional purposes where the government creates the corporation by special law for the furtherance of governmental objectives and controls the corporation by retaining for itself permanent authority to appoint a majority of the corporation's directors. *Lebron* considered whether a corporation is an agency or (Cont'd)

no court has ever held that a Department of the United States Government acts as an agent of a private citizen or a corporation. The reason is obvious: no private actor may rightfully assert control over the acts of the federal government as required to sustain an agency finding.

The absence of a principal/agent relationship flowing from private vessel owners to the United States Government is exemplified by the Public Health System ("PHS") hospitals which originated in 1798 with the passage of the law creating the Marine Hospital Fund to care for merchant seamen.[5] Mariners who were injured or became ill while onboard a vessel were entitled to treatment at these hospitals.[6] ***Over the 183 year life span of the government-run PHS hospitals, no one ever asserted, and no court ever held, that the PHS was an agent of vessel owners even though shipowners could be held liable for a physician's negligence because of the vessel's duty to provide medical care to its crew.***[7]

(Cont'd)
instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution. The threshold consideration for invoking federal constitutional protection is whether federal governmental action is involved, as purely private corporate action does not trigger any constitutional protections). *See also, Correctional Servs. Corp. v. Malesko*, __ U.S.__, 112 S. Ct. 515 (2001) (holding that *Bivens* cause of action may not be extended to confer a right of action for damages against private corporate entities acting under color of federal law).

5. ACT OF JULY 16, 1798, 1 STAT. 605.

6. Clerks in the Treasury Department initially ran the fund, but after 1870 responsibility for the hospitals passed to the Surgeon General of the Marine Hospital Service (later to become the Public Health Service) and its Commissioned Corps. In 1981, as part of the Reagan Administration's budget cuts for the Department of Health and Human Services (renamed in 1980), the last of the PHS hospitals and clinics were closed. *See* http://www.nih.gov.

7. *See* footnote 15 below.

B. The Court's Unprecedented Agency Theory Erroneously Extends the Operational Activities Doctrine Beyond Any Reasonably Cognizable Boundaries

The Sixth Circuit holds that the DOT, which sponsored a fire fighting safety program voluntarily attended by Rannals, was Diamond Jo's agent for Rannals' slip-and-fall in the DOT's parking lot. However, the Sixth Circuit's conclusion that a principal/agent relationship exists based upon the operational activities doctrine is unfounded and misconstrues the rationale behind the doctrine.

In *Hopson v. Texaco, Inc.*,[8] this Court held that the Federal Employers' Liability Act is incorporated into the Jones Act and renders an employer liable for the negligence of its officers, agents, or employees. Adopting the principle first expressed in *Sinkler v. Missouri Pacific Railroad Co.*,[9] this Court concluded that an employer may be held responsible for the negligence of a third-party when the third-party is performing, under contract, the operational activities of a seaman's employer. In *Hopson*, two seaman who became ill in a foreign port were unable to continue their voyage. This Court found the employer liable for their injuries suffered during their transport in a local taxi cab to the United States Consul.[10] This Court focused on the fact that federal law mandated that before a vessel may lawfully sail, a seaman incapacitated in a foreign port must be discharged through transport to a United States Consul.[11]

In construing the term "operational activity," other courts have also seized on the necessity of the third-party's activities to the employer's operations.[12] For example, in *Mounteer v. Marine Transport Lines, Inc.*, the court explained that a third-

8. 383 U.S. 262 (1966).

9. 356 U.S. 326, *reh'g denied*, 356 U.S. 978 (1958).

10. 383 U.S. at 264.

11. *Hopson*, 383 U.S. at 263-64.

12. *See Sinkler*, 356 U.S. at 327 (emphasizing the vitality of the activity); *Hanks v. California Co.*, 280 F. Supp. 730 (W.D. La. 1967).

party may "be an agent for Jones Act purposes if it serves as an integral part of the employer's enterprise and performs an 'operational activity,' particularly if the activity is a statutory obligation for the benefit of the employee."[13] An operational activity is a necessary function of the employer's business that the employer might usually perform, but has chosen instead to contract out to others.[14] A prime example is the provision of medical care to a vessel's crew, which implicates the well-established legal obligation of an employer to provide maintenance and cure to its crew members.[15]

Other considerations include the existence of a contract, the employer's choice of the third-party, and the employer's ownership or other financial interest in the third-party.[16] The element of control is of great significance.[17]

None of the foregoing factors are present in this case. Diamond Jo did not and could not exercise any control over the DOT. Diamond Jo did not own, operate, control, supervise, or direct any portion of the DOT's fire fighting program, which

13. 463 F. Supp. 715, 719 (S.D.N.Y. 1979) (emphasis added).

14. *Williams v. Norfolk So. Ry. Co., Inc.*, 767 F. Supp. 756, 761 (E.D. Va. 1991).

15. *See De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986) (shipowner vicariously liable for negligence of physician it hires to treat its crew because of duty to provide prompt and adequate medical care to its seamen); *Joiner v. Diamond M Drilling Co.*, 688 F.2d 256 (5th Cir.), *reh'g denied*, 688 F.2d 840 (5th Cir. 1982) (employer liable for its negligent selection of an onshore physician and vicariously liable for the negligence of its shipboard physician); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670 (2d Cir. 1971) (physician considered employer's agent when he treated crew member in response to injuries suffered aboard the employer's vessel); *Central Gulf S.S. Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968) (employer liable under agency theory for negligence of independent physician who discharged employer's obligation to provide maintenance and cure through provision of medical care to crew member).

16. *Tim v. American Pres. Lines, Ltd.*, 409 F.2d 385 (9th Cir. 1969).

17. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 478-79 (9th Cir.), *cert. denied*, 513 U.S. 875 (1994).

was open to and attended by personnel from a number of different industries and other employers.[18] Diamond Jo did not provide any of the gear, clothing, equipment, or vessel appurtenances used in the training program. Nor was Rannals required by any statute, the United States Coast Guard ("Coast Guard") or her employer to attend the school. The Sixth Circuit extends the operational activities doctrine beyond any reasonably cognizable boundary solely to afford Rannals a remedy against her employer in this instance. This result-oriented decision flies in the face of longstanding maritime and agency precedent, as well as this Court's pronouncements in *Hopson* and *Sinkler*. Review is warranted to correct this gross aberration and restore order to the law.

II. THE SIXTH CIRCUIT'S DECISION EVISCERATES TRADITIONAL CONCEPTS OF INSURANCE UNDERWRITING BECAUSE INSURERS CANNOT ADEQUATELY ASSESS THE RISK INVOLVED FOR ACTS OF A THIRD-PARTY OVER WHOM THE INSURED EXERCISES ABSOLUTELY NO CONTROL.

Risk is at the heart of insurance. As has been noted by commentators, recognition and identification of the risk element is essential to developing techniques for managing the unknown, and the transfer and distribution of that risk.[19] In assessing premiums and setting reserves for potential losses, underwriters try to limit the unknown by examining the potential risk exposure, studying past losses, the current activities of the insured, and how that risk can be minimized.

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18. As a logical extension of the Sixth Circuit's decision, the DOT will now be required to ascertain and to apply different standards of care, depending upon the particular status of each student attending its safety training programs.

19. ROBERT E. KEETON & ALLAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES 10-11 (1988).

Of course, it is impossible to totally eliminate uncertainty; however, the management of risk is an attainable goal.[20] One form of risk management is risk control which is accomplished by conducting a venture so that risk is minimized.[21] This control of risk is effected by means of: (1) instrumentalities, *e.g.*, train whistles, audio reverse indicators, and anti-lock brakes, or (2) regulation, *e.g.*, toxic waste regulation and dram shop legislation, or (3) safety programs implemented by employers or governmental agencies. The key to minimizing risk and creating a safer world is control over the variables. In the case before this Court the element of control, as acknowledged by the Sixth Circuit's opinion, is clearly lacking.[22]

By utilizing a misplaced agency theory and thereafter mixing and matching liability theories, the Sixth Circuit transforms the DOT's non-existent premises liability under Ohio law to a Jones Act liability for Ms. Rannals' employer, Diamond Jo Casino. While the Sixth Circuit allows recovery where no party has been negligent under the law as it could be known to them, it also, in essence, renders the DOT an additional insured by imposing liability on a Jones Act employer. All this is accomplished without an underwriter being able to assess the potential exposure to an insurer for activities and actors that the Sixth Circuit recognizes are, as a practical matter, impossible for Diamond Jo to control.[23]

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20. *Id.* at 10.
21. *Id.* at 11.
22. *See* footnote 2 above.
23. *Diamond Jo*, 265 F.3d at 451.

III. THE SIXTH CIRCUIT'S DECISION FRUSTRATES THE SOUND PUBLIC POLICY OF ENCOURAGING PEOPLE TO TAKE STEPS IN FURTHERANCE OF ADDED SAFETY. COURTS HAVE LONG RECOGNIZED THE VALUE OF ENCOURAGING THE ADVANCEMENT OF PUBLIC SAFETY.

A. The Coast Guard's Programs: An Effort to Improve Safety on the Seas

In addition to DOT's providing fire fighting training at its facilities across the country, the Coast Guard also sponsors numerous safety programs for the betterment of the maritime industry.

In an effort to promote safety on the navigable waters of the United States, the Coast Guard, in cooperation with the maritime industry, has developed the "Prevention Through People" program ("PTP"). PTP provides a strategy for guiding the maritime community's safety efforts by developing improvements in human behavior, technology, management and the work environment. This program is even being exported to the London-based International Maritime Organization ("IMO") in light of the high ratio of foreign ships calling at ports in the United States.[24]

The Coast Guard also sponsors the "Ship Operations Cooperative Program" ("SOCP") which promotes commercially beneficial innovations in ship operations through the identification, development and application of new methods, procedures and technologies.[25] The overall objective of the program is to improve the competitiveness, productivity, efficiency, safety and environmental responsiveness of United States vessel operations.[26] This cooperative program permits

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24. BUREAU OF TRANSPORTATION STATISTICS, MARITIME ADMINISTRATION, U.S. COAST GUARD, MARITIME TRADE & TRANSPORT 1999 at 56.

25. *Id.* at 95.

26. *Id.*

members to participate in research that would not be economically feasible on an individual basis, or even possibly within a single area of the industry.[27]

The Coast Guard's "Standards of Training, Certification, and Watchkeeping for Seafearers" program ("STCW") is part of a Convention adopted in 1978 at the IMO in London, entered into force in 1984, and amended in 1995.[28]

One of the fundamental objectives of the Convention is to establish standards of competence for the performance of tasks and to have assessments as to whether an individual meets each competence level. In addition, the 1995 amendments establish minimum rest periods for watchkeeping personnel, and require that all mariners receive vessel familiarity and basic safety training. This renewed focus on the human element should reduce the instances in which human error leads to a maritime casualty or a pollution incident. To this end, the Convention is based in part on the principle that proper training, coupled with effective application of quality management principles and use of proper procedures, will promote shipboard practices which prevent human error or detect errors at a point when adverse consequences can be averted.[29] In an effort to implement the STCW, the Coast Guard offers courses to merchant mariners at its Academy in New London, Connecticut.

These programs, as well as many others that abound nationally, are efficacious. Participation in such programs promotes the safety of all Americans and should accordingly be encouraged as a matter of sound public policy. Indeed, the various legislatures and courts of this Nation enjoy a long history of encouraging responsible corporate citizens to actively engage in the development of safety programs that benefit the public, as discussed below. The Sixth Circuit's contrary position should not be permitted to stand.

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27. *Id.*
28. *See* http://www.uscg.mil
29. *Id.*

B. The Common Law Rules of Evidence, Rule 407 of the Federal Rules of Evidence and the Analogous State Evidentiary Rules: Encourage Safety By Rendering Subsequent Remedial Measures Generally Inadmissible

After an accident causing an injury, owners of a premises or of an enterprise will often take remedial measures by either repairing a defect, installing a particular safety device or amending safety rules. Are these new safety measures, which may very well have prevented an injury, admissible in evidence against a party as an implied acknowledgment that due care should have been taken before the injury? Although the admission of such evidence would indeed be very persuasive of an actor's belief regarding the precautions required before the accident, the emphatic answer to this query is: "No!" [30] As noted by commentators and the courts alike, the predominant reason for excluding such evidence is a policy against discouraging the taking of safety measures.[31]

30. The British jurist Lord Justice Bramwell noted that one cannot say that simply because the world gets wiser as it gets older, it was foolish before. *Hart v. Lancashire & Yorkshire R.R. Co.*, 21 L.T.R.N.S. 261, 263 (1869).

31. McCormick on Evidence 815 (3d Ed.) (1985); *see also Ashland Supply Co. v. Webb*, 266 S.W. 1086 (Ky. 1925) (applying the common law theory):

> There are two reasons why evidence of subsequent repair should not be admitted. One is that, while it may be necessary to subsequently repair the appliance, it does not follow from that that the appliance was defective at the time of the accident. The other reason is that, if such evidence were admitted, it would have a tendency to cause employers to omit making needed repairs for fear that the precaution thus taken by them could be used as evidence against them.

Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992); *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991); *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1014 n.1 (5th Cir. 1989); *Rockwood Ins. Co. v. Clark Equip. Co.*, 713 F.2d 577, 579 (10th Cir. 1983); Judson Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 590 (1956).

The common law's practical approach regarding the inadmissibility of subsequent remedial measures was adopted by the Federal Rules of Evidence as set forth in Rule 407, which currently provides that:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.[32]

Rule 407 is supported by a strong commitment to encourage manufacturers to improve their products for greater safety.[33]

The rationale articulated by the various courts under the common law tradition and Rule 407 of the Federal Rules of Evidence applies with equal force here. Sound policy dictates that citizens should not be discouraged from implementing and supporting programs that benefit the public's safety. Yet, the Sixth Circuit's decision does just that by imposing additional liability upon those who sponsor attendance at safety training programs such as the fire fighting school conducted by the DOT in Toledo, Ohio.

C. Dram Shop Legislation: The Safe Harbor of Certification Programs

Before the temperance movement of the Nineteenth Century, a tavern owner could not be held liable for damage caused by an inebriated customer. Under the common law, the courts held that the proximate cause of the damage was the

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32. FED. R. EVID. 407; *see also* TEX. R. EVID. 407 (the rule is typical of those enacted by the States).

33. *Raymond*, 938 F.2d at 1523; *Hardy*, 870 F.2d at 1014 n.1.

drinker, and the tavern owner's role was too far removed to be considered the proximate cause.[34]

Faced with an increased number of accidents stemming from drunk drivers, an organization called the Prevention Research Group conducted an eighteen-month research project which culminated in 1985 with the drafting of the Model Dram Shop Act (the "Model Act").[35]

One of the major goals of dram shop liability and server training laws was to encourage change in traditional hospitality industry practices. The Model Responsible Server Training Act of 1988 (the "Server Training Act")[36] set out a sample curriculum for a training program. The Server Training Act recommended that all programs provide information on alcohol as a drug and its effects on the body, the effect of alcohol combined with other drugs and ways to deal with intoxicated customers. Additionally, the programs would cover recognition of underage customers and state laws relating to civil and criminal liability. The Model Act, as well as the legislation passed in many of the States, provided a defense to liability if the tavern owner participated in a server training program.[37]

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34. Katherine M. Mahoney, *Responsible Service of Alcohol: A Way to Reduce Injuries and Protect Against Liability*, 19 GOLDEN GATE U. L. REV. 279, 281 (1989) (hereinafter "Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV.").

35. Jeffrey Wynn Allen, Note: *Illinois Dram Shop Reform: The Need for a Sword, Not a Shield*, 28 J. MARSHALL L. REV. 215, 237 (1994).

36. MODEL RESPONSIBLE SERVER TRAINING ACT § 6 (1988). The Server Training Act was prepared by the Alcohol Policy Initiatives Project of the Trauma Foundation in San Francisco, California. Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV. at 285.

37. Section 10 of the Model Act, the Responsible Business Practices Defense, provides that a tavern owner is neither negligent nor reckless if the defendant adhered to responsible business practices at the time of service. Evidence of such practices includes comprehensive training of all personnel and maintenance of an adequate number of trained employees and agents for the type and size of the business. (Cont'd)

With the Model Act in hand, many states passed dram shop laws in an effort to stem the tide of death and injury caused by intoxicated drivers.[38]

The results were impressive. Oregon was the first state to require mandatory training for the employees of licensed liquor establishments, and after three years of mandatory training, there was a 23% reduction in single-vehicle night time automobile accidents.[39]

Dram shop legislation is proof-positive that training programs work to benefit the general public, thereby improving the quality of life for all citizens. The same result should obtain in the present case: encourage corporate citizens to implement safety programs rather than punish them for taking positive steps to safeguard the general public.

(Cont'd)

James Mosher, *The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*, 12 WASH. L. REV. 442, 477 (1985); *see also* Mahoney, *Responsible Service of Alcohol*, 19 GOLDEN GATE U. L. REV. at 284.

38. ARIZ. REV. STAT. ANN. § 4-311 (1999); COLO. REV. STAT. § 12-46-112.5 (2000); CONN. GEN. STAT. ANN. § 30-102 (West 2000); FLA. STAT. ANN. § 768.125 (West 1999); IDAHO CODE § 23-808 (2000); IND. CODE ANN. § 7.1-5-10-15.5 (Michie 2000); IOWA CODE ANN. § 123.92 (West 2000); ME. REV. STAT. ANN. TIT. 28-a, § 2506, 2507 (1988); MICH. COMP. LAWS ANN. § 436.22 (West 2000); MINN. STAT. ANN. § 340a. 801 (West 2000); MISS. CODE ANN. § 67-3-73 (2000); MO. ANN. STAT. § 537.053 (Vernon 2000); MONT. CODE ANN. § 27-1-710 (2000); N.H. REV. STAT. ANN. § 507-f:4, 507-f:5 (2000); N.J. STAT. ANN. § 2a:22a-5 (West 2000); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2000); OHIO REV. CODE ANN. § 4399.01 (Banks-Baldwin 2000); OR. REV. STAT. § 30.950 (2000); PA. STAT. ANN. TIT. 47, § 4-497 (Purdon 2000); R.I. GEN. LAWS § 3-14- 1 (2000); TENN. CODE ANN. § 57-10-102 (2000); TEX. ALCO. BEV. CODE ANN. § 2.02 (Vernon Supp. 2002); UTAH CODE ANN. § 32a-14-1 (2000); VT. STAT. ANN. TIT. 7, § 7, § 501 (2000).

39. Allen, *Illinois Dram Shop Reform*, 28 J. MARSHALL L. REV. at 238.

D. Title VII: Encouraging Participation in Training Programs

In the context of Title VII, [40] where employers are subject to vicarious liability for the acts of a supervisor's actions, this Court in *Burlington Industries, Inc. v. Ellerth*[41] and *Faragher v. City of Boca Raton*[42] encouraged an employer's active promotion of and participation in programs designed to educate employees about behavior that is proper in the workplace. This Court stated that:

> in order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court adopts . . . the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated

40. 42 U.S.C. § 2000e, *et seq.*
41. 524 U.S. 742 (1998).
42. 524 U.S. 775 (1998).

> policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[43]

This reasoned approach is the precursor of a more congenial work environment. The same rationale applies here: sound public policy dictates that citizens should be encouraged, not penalized, for improving workplace safety whenever possible.

E. The Good Samaritan Laws: Encouraging Physicians to Render Aid

Classic Good Samaritan statutes provide immunity to qualifying doctors and others who render voluntary assistance. These statutes were enacted to encourage physicians to render medical assistance. Most of these statutes provide immunity against negligence actions; as a result, qualifying persons who commit a negligent act or omission while performing a good deed are excused from liability and such legislation has resulted in saved lives.[44]

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43. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

44. *See, e.g.*, CAL. BUS. & PROF. CODE 2398 (West 1990) (licensees providing emergency medical assistance to participants of athletic events); GA. CODE ANN. 31-11-8 (1991) (licensees providing ambulance service); GA. CODE ANN. 51-1-30.1 (1997) (drivers of fire apparatus); 225 ILL. COMP. STAT. ANN. 60/31 (West 1997) (persons providing services at free medical clinics); 745 ILL. COMP. STAT. ANN. 20/1 (West 1993) (law enforcement officers); IND. STAT. ANN. 15-5-1.1-31 (Michie 1993) (veterinarians); LA. REV. STAT. ANN. 9:2799 (West 1991) (donees of food); N.Y. GEN. MUN. LAW 205-b (McKinney 2000) (volunteer fire fighters); OHIO REV. CODE ANN. 4765.49(E) (Banks-Baldwin 1997) (dispatchers or communicators of requests for emergency medical services); (Cont'd)

CONCLUSION

The Sixth Circuit's decision in this case stifles the responsible corporate citizen. Why should one choose to participate in safety programs of any kind when such participation only results in exposing the employer to liability as an ultimate insurer for the acts of a third-party over whom it has no control? If this result stands, it will provide a powerfu' disincentive to employers who enable or encourage their employees to attend safety training classes. Fearing exposure to liability, these employers would, more likely than not, refrain from actively participating in such endeavors.[45] This would have the undesirable effect of reducing safety training, and, ultimately, safety in the workplace itself.[46] In view of the above, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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WIS. STAT. ANN. 146.37 (West 1996) (persons on oversight health care committees).

45. *Kelly*, 970 F.2d at 1276 (it is "a common sense recognition that people are loath to take actions which increase the risk of losing a lawsuit.").

46. *See First Nat'l Supermarkets v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 898 (2d Cir. 1997) (acknowledging the strong public policies favoring workplace safety).